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2. NATIONAL MONUMENTS: Counties suffer setback on Grand Staircase-Escalante access claims (07/12/2007)

April Reese, *Land Letter* Western reporter

Efforts by two Utah counties to assert right-of-way rights over routes in Grand Staircase-Escalante National Monument suffered a setback last week, when a federal judge determined that those claims must be settled in court, not by federal land managers.

The case -- watched closely by land managers, conservation groups, states' rights activists, and proponents of off-road vehicles -- is just one of several access disputes that have moved into courtrooms for adjudication ([Land Letter](#), June 21).

Kane and Garfield counties, which opposed the creation of the monument in the 1990s, claimed an historic right-of-way to jeep tracks and canyon bottoms under R.S. 2477, a 19th century federal statute.



The Grand Staircase/Escalante National Monument is one front in a continuing battle over access to public lands on old roads and little used trails. Map courtesy of BLM.

In 2005, Kane County posted 268 signs on Bureau of Land Management properties, including more than 100 inside the Grand Staircase-Escalante National Monument, indicating that the posted routes were open to ORV use. At least 63 signs purported to open routes that are closed under BLM's management plan for the monument. Last December, the county removed those signs pending resolution of litigation over the claims.

The counties argued in federal district court that the monument's restrictions for off-road vehicle use is in violation of the law, because some of the tracks counted as "highways" under the statute and should be under county jurisdiction. The counties also said that BLM should have determined those rights-of-way that had not yet been adjudicated by the courts.

But U.S. District Court Judge Bruce Jenkins said the counties must resolve their R.S. 2477 claims in court first, before taking on the off-roading issue. The burden is on the counties to prove their R.S. 2477 claims, not BLM, Jenkins said [*Kane Co. v. Kempthorne, et al.*; U.S. District Court for Utah District, Central Division; No. 2:05-CV-0941BSJ].

"It is for the counties as R.S. 2477 claimants to step forward and pursue their unresolved R.S. 2477 claims in a proper forum, demonstrating the historical existence of rights-of-way that they now assert to exist," the judge wrote. "In the meantime, the counties' assertion of R.S. 2477 claims by itself cannot forestall the BLM implementation of the travel route system."

BLM's final decision on the plan emphasized that "nothing in this plan alters in any way any legal rights the

counties of Garfield and Kane or the state of Utah has to assert and protect R.S. 2477 rights, and to challenge in federal court, or any other appropriate venue, any BLM road closures that they believe are inconsistent with their rights."

Mark Habbeshaw, a Kane County commissioner, said the counties agree that R.S. 2477 claims should be adjudicated, but that previous court decisions have said that BLM can and should determine unadjudicated R.S. 2477 claims during the planning process.

"Our position is simply that before a land management agency just arbitrarily closes and restricts county roads in a planning decision, it should come up with an administrative determination of whether an R.S. 2477 [claim] exists, and if so, what is its scope so they don't interfere with the holder of the right of way."

The counties plan to file an appeal with in the 10th U.S. Circuit Court of Appeals by the end of the week, he said.

The counties also argued that BLM erred in prohibiting off-road vehicle use on routes for which the counties do have legally acknowledged rights-of-way. But Jenkins said that the issue was whether counties have the right to regulate traffic on those routes. That matter should be decided in federal court under the Quiet Title Act, not the Administrative Procedures Act, which the counties had cited, he said.



Escalante Canyon is an enticing destination for off-road vehicles, but subject of disputes over local claims for rights-of-way. Photo courtesy of USGS.

Several environmental groups intervened in the suit, including the Southern Utah Wilderness Alliance, the Wilderness Society, the Sierra Club and the National Trust for Historic Preservation.

Ted Zukoski, an attorney for Earthjustice, who represented the groups, applauded Jenkins' decision. "It's a great day for the Grand Staircase," he said. "The counties wanted to eliminate all protections limiting dirt bikes, ATVs and other off-road vehicles based on the counties' word that somewhere out there were a bunch of roads."

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